

² There were other neighbors who filed letters of opposition, including the Stonebridge Homeowners Association (Exhibit 70), but only those individuals and organizations that actually participate in the hearing are ordinarily listed in the caption.

I. STATEMENT OF THE CASE

Dr. Daniel (Tsanchi) Li, Petitioner, submitted an application on July 18, 2012, seeking a special exception, pursuant to Zoning Ordinance §59-G-2.19,³ to run a private educational institution for up to 60 students at 14194 Travilah Road, Rockville, Maryland. The site is on a 0.989 acre, unplatted parcel in the R-200/TDR Zone, and the property, identified as Parcel P824 on Tax Map FR33, is owned by Dr. Li under Tax Account No. 06-00402831. The school is to be known as the Traville Learning Center.

A hearing was initially scheduled for December 7, 2012. At the requests of Dr. Li, the hearing was postponed four different times, the final postponement having been granted on November 12, 2013, continuing the hearing indefinitely. Exhibit 50. In July of 2013, Technical Staff informed Dr. Li that he would have to submit a traffic study in order for Staff to complete its analysis. Exhibit 41. Dr. Li has never done so.

Because this matter had remained inactive for more than a year after the last postponement, the Office of Zoning and Administrative Hearings (OZAH) sent a letter to Dr. Li on December 16, 2014, giving him until January 7, 2015, to decide whether he was ready to proceed with the case or if he wished to withdraw his petition (Exhibit 53). Dr. Li visited OZAH on Friday, January 9, 2015, and stated that he wished to proceed with his application in some form.

On February 3, 2015, OZAH sent another letter to Dr. Li stating that his case cannot remain inactive on OZAH's hearing calendar indefinitely, and giving him until April 17, 2015, to submit to the Planning Department all the necessary information, plans and documentation in final form. The letter warned Dr. Li that the hearing would not be postponed again absent a showing of good cause. (Exhibit 59).

³ Because the application was filed prior to October 30, 2014, it must be evaluated under the 2004 Zoning Ordinance, not the 2014 Zoning Ordinance. See 2014 Zoning Ordinance §59-7.7.1.B.1.

Dr. Li failed to meet the April 17, 2015 deadline. Exhibit 60. In an email to Technical Staff dated April 27, 2015, Dr. Li acknowledged that “he was really late for the submission,” and gave the excuse that he was “tied up by my current work.” Exhibit 62.

On April 29, 2015, OZAH issued a formal notice scheduling the hearing in this case for May 29, 2015, at 9:30 a.m. Exhibit 63. On May 5, 2015, OZAH received a letter (Exhibit 66(a)) from Dr. Li, dated May 4, 2014, requesting still another continuance. Dr. Li’s letter said only the following:

We thought about changing the direction to a pre-K daycare [*sic*] center. But, after a careful study of the additional efforts required, we decide to stay with the original objective: Private Education Institution. This letter is to request for an additional postponement [*sic*] the hearing date for Case #82851 [*sic*]. The original hearing date is May, 2015. We will be able to finalize it in September of this year.

On May 5, 2015, the Hearing Examiner denied the continuance request based on a failure to show good cause for another postponement. Exhibit 68.

On May 20, 2015, the Technical Staff of the Planning Department issued a report recommending denial or postponement because Petitioner has never supplied the traffic study Technical Staff required of him almost 2 years ago, in July of 2013. Exhibit 69. Technical Staff did not submit this case for review by the Planning Board, apparently because Petitioner never supplied information that Technical Staff required to complete a substantive review of the petition.

This petition is opposed by two homeowners’ associations – Barrington Homeowners Association (Deborah Isaacs and later Narendra Shah) (Exhibit 38 and Tr. 13-16) and Stonebridge Homeowner’s Association (Timothy Henderson) (Exhibit 70); and by a number of individual neighbors – Kim Hou Chan (Exhibit 21 and Tr. 18-20); Irma Tuan-Hwa Liu (Exhibit 40 and Tr. 11-13); Lingda Tang (Exhibit 39); Milind Soni (Exhibit 45); Byron Johns (Tr. 16-18); and Jeffrey Lolley (Tr. 20-22). All expressed concerns about traffic that would be generated by the proposed use, as well as other issues.

The hearing was held, as scheduled, on May 29, 2015. Neither the Petitioner nor any representative of the Petitioner appeared at the hearing. Although it was noticed to begin at 9:30 a.m., the Hearing Examiner waited till 9:40 a.m. to begin, while awaiting the arrival of the Petitioner. When the Petitioner did not appear, the Hearing Examiner called the case. Five witnesses appeared in opposition: the Barrington Homeowners Association, by Narendra Shah; and four neighbors –Irma Tuan-Hwa Liu, Byron Johns, Kim Hou Chan, and Jeffrey Lolley. All testified in opposition and all raised concerns about traffic, among other issues.

The hearing was adjourned at 10:09 a.m., by which time Petitioner still had not appeared, and the record was held open until June 8, 2015, solely to receive the transcript. The record closed as scheduled on June 8, 2015.

Based on this procedural record, as well as the concerns of the neighborhood and the analysis of Technical Staff, the Hearing Examiner recommends disapproval of the proposed special exception due to Petitioner's failure to timely prosecute his case or meet required deadlines. A brief description of the case follows.

II. FACTUAL BACKGROUND

A. The Subject Property and Surrounding Neighborhood

Technical Staff describes the subject site as a rectangular-shaped property, improved with a two-story dwelling built in 1928, and a detached two-car garage (Exhibit 69, pp. 1-2):

. . . The parcel has two entrances off of the west side of Travilah Road with an asphalt and gravel driveway that loops around the rear of the dwelling. There are nine trees, including maples, pines and cherry, located along the boundary of the property, and also a 21-inch maple adjacent to a stone patio in the rear yard. The property has a gentle slope down from the street to the rear of the site.

Staff also describes the nearby homes and the neighborhood, in general (Exhibit 69, pp. 1-2):

Single-family residences also in the R-200/TDR Zone, abut the property on the north, south and west. Across Travilah Road to the east are single-family residences, also in the R-200/TDR Zone. . . . The neighboring properties have sections of wood and vinyl fencing along their property lines.

These features can be seen in the Vicinity map provided by Technical Staff (Exhibit 69, p. 2), and reproduced below:



It is clear from this map that the subject site is essentially surrounded by single family homes.

B. Proposed Use

Technical Staff described the proposed use in its report. Staff's first paragraph describes the current program allegedly being run by Petitioner at public school facilities after school, weekends

and summers (Exhibit 69, p. 2):

The applicant, Dr. Daniel (Tsanchi) Li, started Traville Learning Center in the fall of 1995 as an educational program for elementary, middle and high school students. The program is held at public school facilities after school, weekends and summers. Traville Learning Center offers educational services that supplement the existing school system and provides continuous academic enrichment to students when the schools are not in session.

Technical Staff then describes the proposed use as Petitioner plans it at the new facility intended for the subject site (Exhibit 69, p. 3):

At the end of the school day, three school buses will transport the students from local schools in the Thomas S. Wootton Cluster to the new facility. Buses from Lakewood, DuFief and Travilah Elementary Schools will drop off students in front of the center on Travilah Road. Students from the nearby Stone Mill Elementary School will be escorted by a student aide to the facility via the sidewalk along Stonebridge View Drive. Other students will bike or arrive by car or shuttle. Traville Learning Center offers educational services to students, ranging from Grade 1 to Grade 12, who need extra help or challenges.

The applicant proposes to demolish the existing two-story 2,578 square-foot dwelling and detached garage and construct a one-story, private educational institution for up to 60 students, five staff and three high school aides. The 6,070 square-foot facility will include three classrooms- each having seating for 20 students, a lobby and reception area, four offices, a workroom, kitchen, restrooms and a storage area.

The applicant provided an Operation Model for the proposed facility that includes operations for the regular, early release and non-school days. The Operation Model dated June 13, 2013 in the applicant's statement of operation included Saturday and Sunday hours. At the request of staff, the applicant agreed to reduce Saturday hours and to eliminate Sunday hours. . . .

C. Community Concerns

Concerns of the surrounding neighborhood were expressed both in letters and in testimony at the hearing.

This petition is opposed by two homeowners' associations – Barrington Homeowners Association (Deborah Isaacs and later Narendra Shah) (Exhibit 38 and Tr. 13-16) and Stonebridge Homeowner's Association (Timothy Henderson) (Exhibit 70); and by a number of individual neighbors – Kim Hou Chan (Exhibit 21 and Tr. 18-20); Irma Tuan-Hwa Liu (Exhibit 40 and Tr. 11-

13); Lingda Tang (Exhibit 39); Milind Soni (Exhibit 45); Byron Johns (Tr. 16-18); and Jeffrey Lolley (Tr. 20-22). All expressed concerns about traffic that would be generated by the proposed use, as well as other issues.

Exhibits 39 and 45 are identical lists of reasons for opposition, set forth below:

We are OPPOSED to the petition because of the following reasons, but not limited to:

1. Inappropriate Zoning Change:

The subject site is currently categorized as R-200 which by definition is one family residential with minimum lot area of 20,000 square feet for each dwelling.

Zoning of surrounding properties are also one-family residential. The proposed zoning change petition in this small area will create huge impact to our light residential neighborhood.

- a. Subject site is less than one (1) acre, and every inch of land is being used in the proposed plan. There is no buffer area to adjunction properties. Does that meeting the Zoning Code?!
- b. Occupants of the subject property will dramatically increase if the zoning petition is being approved. It is very contradicted to the current zoning design, which is residential, not commercial.
- c. Special exception petition in the middle of residential zoning and in the middle of a street block with single-family houses which is not appropriated at all.

2. Increase Traffic Volume:

Our neighborhood is classified as light residential street. Due to past accidents and traffic issues on Travilah Road that closed to the subject site, speeding camera already installed in the area recently. The proposed Learning Center will cause huge impact to current traffic volume.

- a. Traffic for a one-family residential will be much less comparing to a Learning Center of 60 students plus teachers. A lot of vehicles will be in and out from the subject site for drop off and pick up.
- b. Safety of pedestrians on the trail (which in front of the subject site) along the Travilah Road will be another concerned.

3. Safety, Noise and Environment Impact:

The proposed facility is packed in less than one (1) acre of land in the middle of single-family houses. With the increase of vehicles and human traffic, safety of the neighborhood, noise generated by the facility and storm water from the new development will be a huge impact to our current neighborhood.

4. Hour of Operation:

Proposed Learning Center will be operated in a quiet neighborhood when most of residents are home.

- a. Long hours of operation, especially for non-school days, holidays, weekends, and summer break.
5. There are enough "kid/student centers" in the neighborhood and I have not heard anyone complaining about shortage of. On Travillah Road itself there are at least three kids center and then there are three or four day-care/learning center Montessori school within 2 mile radius.
6. We noticed that within all of the people signed on the petition letter for this Leaning Center, only ONE is living in our neighborhood. It is a classic example of "not in my backyard" and this is not fair to our properties owners that are closed to the subject site. So, for the needs and supports of the learning center are not acceptable.
7. Even though our property is not adjunction to the subject site, but we (including our adjunction neighbors) are less than 60 ft from the subject site. It is surprising that we never get any notice about the proposed plan or public hearing. We had to register in the Montgomery County as interest parties after obtaining the information from posted sign.
8. Once the zoning is change away from residential, there is no guarantee that it will not be change again if the proposed Learn Center is no longer operated by any chance.

At the hearing, five witnesses appeared in opposition: the Barrington Homeowners Association, by Narendra Shah; and four neighbors –Irma Tuan-Hwa Liu, Byron Johns, Kim Hou Chan, and Jeffrey Lolley. All testified in opposition and all raised concerns about traffic, among other issues, as set forth in the next section of this report.

III. SUMMARY OF THE HEARING

The hearing was held, as scheduled, on May 29, 2015. Neither the Petitioner nor any representative of the Petitioner appeared at the hearing. Although it was noticed to begin at 9:30 a.m., the Hearing Examiner waited till 9:42 a.m. to begin while awaiting the arrival of the Petitioner. When the Petitioner did not appear, the Hearing Examiner called the case. Five witnesses appeared in opposition: the Barrington Homeowners Association, by Narendra Shah; and four neighbors – Irma Tuan-Hwa Liu, Byron Johns, Kim Hou Chan, and Jeffrey Lolley. All testified in opposition. The hearing was adjourned at 10:09 a.m., and the record was held open until June 8, 2015, solely to receive the transcript. The brief testimony of the witnesses in opposition is summarized below:

1. Narendra Shah, on behalf of the Barrington Homeowners Association (Tr. 13-16):

Narendra Shah testified on behalf of the Barrington Homeowner's Association (BHA). The BHA feels that Dr. Li is proposing a commercial use in a residential zone. Travilah is already very busy. The number one issue is going to be traffic because there is already a lot of traffic on the road. Number two, the BHA does not think the County should allow the commercial development in a residential zone.

Mr. Shah also noted that there is a local elementary school, and he suggested that perhaps it could make room for Dr. Li there, instead of giving permission to Dr. Li to go ahead with his special exception. [The Hearing Examiner replied that there may be alternatives, but he had to review the application before him, not any possible alternatives.]

Mr. Shah added that he believes there is going to be a condominium development on Travilah, which will also add to the traffic. The BHA believes that the special exception proposed by Dr. Li will be a nuisance to the community, and Mr. Shah noted that some of the neighbors' houses are right next to Dr. Li's house. Activities on the site will be very disturbing to them.

2. Irma Tuan-Hwa Liu (Tr. 11-13):

Irma Tuan-Hwa Liu testified that she opposes this application because the education institute would operate 8:00 a.m. to 7:00 p.m., during non-school days or holidays or summertime. Also the traffic is going to be very bad and the number of children will create noise. She is adjacent to his property, and she fears that sewage from the site will get into her property. She is also concerned about having a dumpster that close to her property.

3. Byron Johns (Tr. 16-18):

Byron Johns testified that he lives in one of the first three houses in the Barrington Community that is buttressed by the property in question here. He is opposed to the application for the reasons mentioned by the other neighbors in terms of traffic and the commercial use and disturbance of the residential area. The hours proposed by Dr. Li are 7:00 to 7:00, but whatever the

hours are that he has projected, they are probably conservative and will often go later than that. He proposes to operate 365 days a year, whether schools are out or not, and he intends to have that use on weekends. No one supporting this project lives in this community.

Mr. Johns is also concerned that the term private educational institution has fairly broad meaning and can be interpreted many ways. It might entail things that are adverse to the community and to the interest of the neighbors.

Mr. Johns is very concerned about the traffic because it is on a one-lane road, each way. To one side, there is a brand new community center that will be bringing more traffic. To the other side, there are the condos that will be built. So the traffic there is already pretty much meeting its capacity.

Finally, Mr. John raised a concern about property values because this kind of an institution right in the neighbors' backyards brings concerns about the quiet, peaceful nature of the community.

4. Kim Hou Chan (Tr. 18-20):

Kim Hou Chan testified that his property is the second house in Orchard Valley which is probably less than 60 feet away from this property where they want to build this learning center. He objects to this center because of the traffic impact and the stormwater management issue. Even now in his backyard, there is a lot of ponding water, and this project may make it worse.

Mr. Chan added that there is no need for this facility in his neighborhood, and it's not something the community wants. It's in the middle of a quiet area.

5. Jeffrey Lolley (Tr. 20-22):

Jeffrey Lolley testified that he lives directly across Travilah Road from the proposed special exception in a small community. It is called Willow Oaks, and it has about 12 properties. He is opposed to this request for three or four different reasons.

The first reason is that he objects to the construction of a commercial building in the middle of a residential area. Right now everything around this area is residential until you get farther up Travilah Road towards Travilah Gateway Shopping Plaza or down towards the school, Travilah Elementary School.

The second point is traffic. Travilah Road is an extremely busy road, and the intersection near this proposed facility has proven to be a fairly hazardous intersection, with a lot of accidents. The County had to put speed cameras directly in front of this location to try and deal with that. It's the primary turn into the Stonebridge community as well as Stone Mill Elementary School, and it's a heavily traveled road.

There is also a walking and bath pike that is on the road in front of this property, and it is the primary path utilized for children to play and for people to walk in the community. Adding a thoroughfare into a business area on that bike path is a concern. His children use that every day to ride their bikes and walk around. He feels the proposed use would create a significant hazard by having a commercial entrance and exit cross the pedestrian and bike path.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The Zoning Ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

These standards are usually analyzed seriatim to determine whether a Petitioner has met his burden; however, this report does not contain the usual section-by-section analysis because the

Petitioner failed to provide the information required by Technical Staff to fully evaluate this case. Despite repeated efforts by Staff to obtain the information from Petitioner over the years this case has been pending, Petitioner never supplied the required information. As stated in the Technical Staff report (Exhibit 69, p. 4):

Insufficient information has been submitted by the applicant in order for staff to make all of the findings required for approval under Sections 59-G-1 and 59-G-2 (previous Zoning Ordinance). In July, 2013, staff informed the applicant that a traffic statement was not sufficient and that a traffic study would be required in accordance with Local Area Transportation Review and Policy Area Mobility Review Guidelines. In October, 2013 the applicant followed up with a proposal to limit the number of vehicles. Staff informed the applicant that the proposal did not serve as a justification for not providing a traffic study.

Without having a complete and adequate traffic study to analyze, staff cannot fully address whether the proposed hours of operation and the number of students and staff coming to the facility is appropriate for the site area. In addition, the impact to the local transportation network cannot be determined without a complete traffic study.

The Hearing Examiner finds that Technical Staff made reasonable efforts to obtain the information they needed to complete their report, but they were thwarted by the continuing failure of Petitioner to supply the required data, and by his repeated failure to keep his promises to do so.

As is evident from the recitation of the procedural history in Part I of this report, the Petitioner has continually and repeatedly failed to meet deadlines in this case, and even failed to appear at the hearing of his case. Both the Technical Staff and the Hearing Examiner have been more than tolerant of the continual delays requested by the Petitioner, but at some point, a case must move forward to a hearing. The Montgomery County Council has recently made it quite clear that its policy is to make sure that the development review process moves forward at a reasonable pace.

On September 10, 2013, in an effort to streamline the process for review of development applications, the Council adopted Resolution 17-859, which calls for reporting on the processing times for reviews of development applications. When the Council adopted its new Zoning

Ordinance, effective October 30, 2014,⁴ it established a 120-day standard for setting up the hearing date in special exception cases (called “conditional use cases” in the new Zoning Ordinance). *2014 Zoning Ordinance §59-7. .3.1.C.1*. This Petitioner passed that point about two and a half years ago.

While the new Zoning Ordinance does not govern this case, the time limits for setting up hearings established therein, in combination with the terms of Resolution 17-859, are a clear indication of County policy to avoid undue delays in the development review process. But even without considering those Council pronouncements, the Petitioner’s failure to prosecute his case with anything approaching due diligence and his failure to comply with required timelines, or even to appear at his own hearing, mandate a recommendation for denial of this petition.

In the absence of a Technical Staff report analyzing the substance of the case, an absence brought about by the Petitioner’s own recalcitrance, it is not possible to fully review the merits of the petition. However, it can be said that Petitioner’s failure to provide the traffic study required by Technical Staff almost two years ago goes to the heart of the concerns expressed by all the neighbors opposing this proposal. On this count, Petitioner has clearly failed to meet his burden of demonstrating that transportation facilities will be adequate to handle the traffic that will be generated by his proposed school, as required by Zoning Ordinance §59-G-1.21(a)(9).⁵ Nor has he met his burden of demonstrating that the traffic generated will not create a nuisance for the neighborhood, as required by Zoning Ordinance §59-G-2.19(a)(1).⁶ In fact, based on this truncated record, Petitioner has not made any of the showings required by the Zoning Ordinance §§59-G-1.21, 1.23, 1.26 and 2.19.

⁴ Adopted by Ordinance No. 17-43 on March 4, 2014, and revised by Ordinance No. 17-52 on September 30, 2014.

⁵ Zoning Ordinance §59-G-1.21(a)(9) requires that Petitioner prove that the subject site “Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.”

⁶ Zoning Ordinance §59-G-2.19(a)(1) requires a finding that “. . . the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood.”

Zoning Ordinance §59-G-1.21(c) provides:

(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

The Hearing Examiner finds that Petitioner has failed to meet any of these burdens. The Hearing Examiner's conclusion amounts to both a finding that Petitioner has failed to prevail on the merits of the case and a finding that Petitioner's failure to follow reasonable requirements of the special exception process, despite being given multiple opportunities, warrants dismissal of this petition on procedural grounds.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2851 for a special exception to permit a private educational institution at 14194 Travilah Road, Rockville, Maryland, be DENIED.

Dated: June 11, 2015

Respectfully submitted,



Martin L. Grossman
Hearing Examiner